

The Cooperating Witness Who Lies—A Challenge to Defense Lawyers, Prosecutors, and Judges

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According to the United States Department of Justice, many cooperating witnesses are “outright conscienceless sociopaths” who will do anything to benefit themselves, including “lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and doublecrossing anyone with whom they come into contact.”¹

Nevertheless, prosecutors commonly encourage and use cooperating witnesses, and, not surprisingly, this practice has resulted in a significant number of wrongful convictions.² One career informant boasted that in more than a dozen cases in which he had been imprisoned for crimes, including robbery and kidnapping, he had earned his release by falsely testifying against someone else.³ To paraphrase a famous query, ‘Where were the prosecutors, the defense lawyers, and the judges while this was happening time after time after time?’⁴

Professor Robert Batey has done a singular service in assembling an impressive group of eight legal scholars and practitioners, including present or former prosecution and defense lawyers, to comment on the issue of the perjurious cooperating witness, and they have produced an important symposium of varied and insightful comments.⁵ Five of the group have addressed the responsibilities of

* Professor, Hofstra University Law School; Visiting Professor, Georgetown University Law Center; author, *UNDERSTANDING LAWYERS’ ETHICS* (3d ed. 2004) (with Abbe Smith).

¹ Stephen S. Trott, *The Successful Use of Informants and Criminals as Witnesses for the Prosecution in a Criminal Case*, in U.S. DEP’T. OF JUSTICE, PROSECUTION OF PUBLIC CORRUPTION CASES 118 (1988), quoted in MONROE H. FREEDMAN & ABBE SMITH, *Ch. 6: The Perjury Trilemma*, in *UNDERSTANDING LAWYERS’ ETHICS* 329 (3d ed. 2004). The author was Stephen S. Trott, then an Associate Attorney General, now a judge in the United States Court of Appeals for the Ninth Circuit.

² See The Innocence Project, *Understanding the Causes: Informants/Snitches*, <http://www.innocenceproject.org/understand/Snitches-Informants.php> (last visited Apr. 14, 2010) (reporting that such testimony was a key factor in more than fifteen percent of wrongful convictions uncovered by DNA evidence).

³ *A Snitch’s Story*, TIME, Dec. 12, 1988, at 32.

⁴ *Lincoln Savings & Loan v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990) (Sporkin, J.). As a result of this career informant’s confession, and the resultant adverse publicity, the district attorney’s office reviewed every conviction of a major crime obtained with jailhouse testimony in the preceding ten years. The investigation turned up 120 questionable cases. *A Snitch’s Story*, *supra* note 3, at 32; see also Martin Berg, *D.A. Memo Airs Private Suspicions of Snitch Misuse*, L.A. DAILY J., Aug. 17, 1989, at 1. Nevertheless, the state prosecutors’ office opposed reopening any of the convictions obtained through the admittedly false testimony of the career informant.

⁵ Commentary Symposium, *Criminal Law Defense, Ethics, and the Client Who Plans to Lie*, 7 OHIO ST. J. CRIM. L. 637 (2010).

the criminal defense lawyer: Roberta K. Flowers,⁶ John Wesley Hall, Jr.,⁷ Kevin C. McMunigal,⁸ Fritz Scheller,⁹ and Ellen Yaroshefsky.¹⁰ Two have focused on the prosecutor: Bruce A. Green¹¹ and Rory K. Little.¹² And one, Peter A. Joy, has discussed the system as a whole, with special reference to prosecutors and judges.¹³ All of the essays are short, within limits set by the editors, and all are worth reading in their entirety. Accordingly, I will not summarize them or identify occasional points of disagreement, but will comment on the only essay with which I have fundamental disagreements. I will then discuss an actual case of a perjurious cooperating witness in which I had some involvement.

I. MY ANSWER TO THE HYPOTHETICAL

First, though, I should answer directly the question raised by Professor Batey in his hypothetical.¹⁴ In brief, a lawyer represents a defendant in a prosecution for transporting heroin into the United States. The evidence against her is such that conviction and a long sentence are very likely. In order to reduce her sentence, the client agrees with the prosecutors to provide evidence against a reputed “drug kingpin” whom the U.S. Attorney’s Office has a substantial interest in prosecuting. The lawyer assists the client in negotiating the deal with the prosecution. Before the kingpin’s trial and the client’s guilty plea, she tells the lawyer that her testimony will be “all lies.” At the same time, however, she is well acquainted with the kingpin, and based on that acquaintance she is convinced that he is guilty. What should the lawyer do?

Professor Batey has striven to set up a case in which the lawyer “knows” that the client is lying so that under Model Rule 3.3(b) the lawyer would be required to take remedial measures, including, if necessary, disclosure to the tribunal.¹⁵

⁶ Roberta K. Flowers, *The Role of the Defense Attorney: Not Just an Advocate*, 7 OHIO ST. J. CRIM. L. 647 (2010).

⁷ John Wesley Hall, Jr., *5K1.1 to be Obtained by Perjury—What to Do, What to Do?*, 7 OHIO ST. J. CRIM. L. 667 (2010).

⁸ Kevin C. McMunigal, *Defense Counsel and Plea Bargaining Perjury*, 7 OHIO ST. J. CRIM. L. 653 (2010).

⁹ Fritz Scheller, *Cutting Bait*, 7 OHIO ST. J. CRIM. L. 673 (2010).

¹⁰ Ellen Yaroshefsky, *My Client, the Cooperator, Lied: Now What?*, 7 OHIO ST. J. CRIM. L. 659 (2010).

¹¹ Bruce A. Green, *Ethically Representing a Lying Cooperator: Disclosure as the Nuclear Deterrent*, 7 OHIO ST. J. CRIM. L. 639 (2010).

¹² Rory K. Little, *“It’s Not My Problem?” Wrong: Prosecutors Have an Important Ethical Role to Play*, 7 OHIO ST. J. CRIM. L. 685 (2010).

¹³ Peter A. Joy, *Constructing Systematic Safeguards Against Informant Perjury*, 7 OHIO ST. J. CRIM. L. 677 (2010).

¹⁴ Robert Batey, *Introduction*, 7 OHIO ST. J. CRIM. L. 637 (2010).

¹⁵ “A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the

Unfortunately, however, the American Bar Association, the American Law Institute, judges, and fee-paid lawyers have conspired to frustrate Professor Batey's purpose.¹⁶ That has been done by the Model Rules' definition of the "knowing" as "actual knowledge."¹⁷

Actual knowledge has been construed to mean that a lawyer does not have the knowledge required by Model Rule 3.3(b), even when the client's testimony is preposterous,¹⁸ "far-fetched,"¹⁹ and is "dramatically outweighed by other evidence."²⁰ Only information that "the attorney [1] reasonably knows to be a fact and which, [2] when combined with other facts in his knowledge, would clearly establish the existence of a fraud on the tribunal" would require remedial action by the lawyer.²¹ Consider also the opinion of Professor Geoffrey C. Hazard, Jr., former Director of the ALI and the reporter who wrote and defended Model Rule 3.3 on behalf of the ABA.²² Based on his wide professional associations, Hazard has found that "many judges show strong sympathy for an advocate whose client wants to commit perjury in a criminal case."²³ Hazard's understanding is that "these judges believe that the game of trying to compel counsel to be a gatekeeper in this context is not worth the candle of the additional light of truth that could be achieved."²⁴ Reflecting on how Model Rule 3.3 has failed in practice, Hazard now maintains that "requiring a criminal defense lawyer to 'blow the whistle' on client perjury is futile or counterproductive."²⁵

A federal judge recently confirmed Hazard's observation. "All judges," she wrote, "face many occasions when [they] are sure a witness or a defendant in a

proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2009).

¹⁶ See Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133, 142–48 (2008).

¹⁷ MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (2009). Both the Model Rules and the Restatement of the Law Governing Lawyers say also that "knowledge may be inferred from the circumstances." However, that inference can be drawn only if the lawyer ignores what is "plainly apparent" and engages in "conscious ignorance." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 cmt. c & rep. n. cmt. c (2000). Moreover, despite the reference to "conscious ignorance," the lawyer may avoid "knowing" information that could be discovered through reasonable inquiry. *Id.*

¹⁸ See *infra* note 26–27 and accompanying text; see also RESTATEMENT, *supra* note 17.

¹⁹ United States v. Midgett, 342 F.3d 321, 326 (4th Cir. 2003).

²⁰ *Id.* at 327.

²¹ *In re Grievance Comm. of the U.S. Dist. Ct.*, 847 F.2d 57, 63 (2d Cir. 1988).

²² See, e.g., Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669 (1981); Monroe H. Freedman, *Are the Model Rules Unconstitutional?*, 35 U. MIAMI L. REV. 685 (1981).

²³ Geoffrey C. Hazard, Jr., *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 HOFSTRA L. REV. 1041, 1051 (1997).

²⁴ *Id.*

²⁵ *Id.* at 1060.

criminal case has lied on the stand.”²⁶ Making no distinction between the defendant and other witnesses, the judge added that there are times when a witness’s testimony is so “preposterous” that the judges “wonder how . . . lawyer[s] can permit [their] client[s] or witness[es] to testify to the alleged fact[s], or to argue based on the perjured testimony.”²⁷ Nevertheless, “[i]t would be very difficult, and involve complicated and perhaps impermissible intrusions into the attorney-client privilege . . . to attempt to make a factual finding about what the lawyer believed.”²⁸

Returning to our hypothetical, the client has previously told the lawyer, and is continuing to tell the prosecutor, that her evidence is truthful. In view of the client’s inconsistent stories, the lawyer can readily conclude that he does not have actual knowledge of intended perjury.²⁹

However, there is an important caveat to that answer. As Professor Yaroshefsky notes, the prosecutor may have another target—the defense lawyer himself.³⁰ Accordingly, if a client makes such an unlikely admission as in the hypothetical, a prudent lawyer might well make it clear to the body wire that the client (presumably) is wearing, that the lawyer is confused by the client’s inconsistent stories and uncertain what to believe, and that if the client really means that she is going to lie, the lawyer will have to tell the court.³¹ The client then will either revert to maintaining the truth of her proposed testimony, or else she will reiterate the “all lies” assertion, thereby making it clear that she is setting the lawyer up for the prosecutor.

I do not enjoy that kind of disingenuousness, and it is not my view of the

²⁶ Elaine E. Bucklo, *From the Bench: When Lawyers Lie*, LITIG., Winter 2007, at 3, 4 (Judge Bucklo sits in the United States District Court for the Northern District of Illinois).

²⁷ *Id.*

²⁸ *Id.* See also Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of An Answer*, 1 GEO. J. LEGAL ETHICS 521, 536–37 (1988). The defendant’s right to testify cannot be denied by the unreviewed conclusion of counsel. Thus, the defendant is entitled, at the least, to an “on-the-record judicial hearing.”

²⁹ If the lawyer’s decision should later be questioned, presumably the same standard of review would be used in reviewing the lawyer’s judgment as the Supreme Court uses to determine whether there has been ineffective assistance of counsel—that is, the court must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

³⁰ See, e.g., Aaron M. Clemens, *Removing the Market for Lying Snitches: Reforms to Prevent Unjust Convictions*, 23 QUINNIAC L. REV. 151, 205 (2004) (discussing the prosecution of attorney Patrick Hallinan based on a drug conspiracy client who falsely implicated the lawyer), cited in Yaroshefsky, *supra* note 10, at 660 n.3.

³¹ See Professor Freedman’s comment in Stephen Gillers, *Monroe Freedman’s Solution to the Criminal Defense Lawyer’s Trilemma is Wrong as a Matter of Policy and Constitutional Law*, 34 HOFSTRA L. REV. 821, 841–42 (2006).

Professor Gillers has declined invitations to debate the trilemma issue with Professor Freedman, most recently an invitation from the editor-in-chief of the Georgetown Journal of Legal Ethics.

proper way for a lawyer to resolve the issue.³² It is a response to the ABA's own disingenuousness in promulgating a rule that lawyers are expected to evade, and that most lawyers do evade. Those lawyers who do choose to reveal their clients' perjury to the court are virtually always court-appointed lawyers for defendants who are poor and, generally, members of minority groups.³³ In practice, therefore, Model Rule 3.3 has produced a de facto denial of equal protection. Significantly, no supporter of Model Rule 3.3 has addressed this issue, perhaps because it reveals the hollowness at the core of their policy arguments. Indeed, Professor Stephen Gillers, when confronted with the issue following a talk he gave supporting Model Rule 3.3, understandably evaded discussing the fact that the rule is never followed in practice except in court-appointed cases.³⁴

II. SOME FUNDAMENTAL DISAGREEMENTS

The only panelist with whom I have fundamental disagreements is Professor Flowers. Relying on the Preamble to the Model Rules, Professor Flowers describes the criminal defense lawyer as "a member of the legal profession, . . . a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."³⁵ And she adds that the lawyer is an "officer of the court" seeking truth and justice.³⁶ However, these are the kinds of general propositions that, as Justice Holmes reminded us, "do not decide concrete cases."³⁷ As Professor Flowers recognizes, to her credit, her reliance on these propositions might look like an "overly simplistic view of a complicated problem."³⁸

³² See, e.g., Freedman, *supra* note 16 (defending the traditional view).

³³ See *id.* at 148–52.

³⁴ See, e.g., *supra* note 31, at 843 (colloquy between Professors Freedman and Gillers). When directly confronted with this issue, Professor Gillers replied, in full: "So now we got a little too complicated, because we forced the lawyers to look at the rules. All right. Well, then there are—that would be part of the record and, you know, it depends upon the conversation—."

³⁵ Flowers, *supra* note 6, at 647 (quoting MODEL RULES OF PROF'L CONDUCT pmbl. (2009)).

³⁶ *Id.*

³⁷ *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

³⁸ Flowers, *supra* note 6, at 647. Professor Flowers also attributes the negative public perception of the legal profession, in part, to "[t]he unwillingness of attorneys, whether criminal defense or others, to assume all of the roles assigned to them." *Id.* However, she cites nothing that supports that questionable causal connection. Her source, Professor L. Timothy Perrin, does provide empirical support for the proposition that lawyers are distrusted by a large percentage of the public, but he nowhere provides any empirical evidence that public distrust is caused by an unwillingness of attorneys to assume the three roles that Flowers refers to. Indeed, Perrin even suggests the possibility—as I believe to be the case—that the source of the problem is the public's "failure to understand the lawyer's role in our adversary system of justice." See L. Timothy Perrin, *The Perplexing Problem of Client Perjury*, 76 *FORDHAM L. REV.* 1707, 1707–08 (2007). Moreover, I believe that academics like Flowers contribute to that public failure to understand the lawyer's role. See Monroe H. Freedman & Abbe Smith, *Misunderstanding Lawyers' Ethics*, 108 *MICH. L. REV.* 925 (2010).

Contrary to Professor Flowers, the ABA Standards Relating to the Defense Function do not simply “suggest” that the criminal defense lawyer serves all of these functions through dedicated representation of the accused. Standard 4-1.2(b) says expressly and emphatically that the “basic duty” that defense counsel owes “to the administration of justice and as an officer of the court” is to serve the client with “courage and devotion and to render effective, quality representation.”³⁹

Also, Justice Lewis Powell, on behalf of eight members of the Supreme Court, wrote that “a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing ‘the undivided interests of his client.’”⁴⁰ In short, in a free society the lawyer, as an officer of the court, serves both the administration of justice and the public by serving the undivided interests of individual clients.

Professor Flowers also relies on Model Rule 3.3 as establishing that the lawyer’s obligation to the truth is more important than confidentiality.⁴¹ Like other defenders of Model Rule 3.3, however, she ignores the fact that Model Rule 3.3 is honored only in the breach, a breach that is virtually universal in cases involving fee-paying clients, and which is followed only in cases involving indigent defendants represented by court-appointed lawyers.

A highly publicized illustration of Model Rule 3.3 in action is in the criminal prosecutions arising from the Enron scandal, where both Kenneth Lay and Jeffrey Skilling denied having committed any fraud or other wrongdoing.⁴² Although twelve strangers on each of the juries in those cases were able to conclude, beyond a reasonable doubt, that both defendants were testifying falsely, their own lawyers failed to reach that conclusion—and surely those lawyers will not be subjected to professional discipline for those failures. On the contrary, the defense lawyers were doing exactly what the ABA and the courts expect them to do—to advocate zealously on behalf of their clients without assuming the role of the judge and jury.

Ultimately, Professor Flowers concludes that the lawyer is required to disclose client perjury by quoting *United States v. Havens* for the proposition that “when defendants testify, they must testify truthfully or suffer the consequences.”⁴³

³⁹ ABA STANDARDS FOR CRIM. JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-1.2(b) (3d ed. 1993).

⁴⁰ *Polk County v. Dodson*, 454 U.S. 312, 318–19 (1981) (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)), quoted in MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 10 (3d ed. 2004).

⁴¹ Flowers, *supra* note 6, at 649. For authorities on this point, Professor Flowers contrasts an article that I wrote in 1966 against one written by Professor Gillers forty years later. *Id.* at 649 n.14. In doing that, she ignored several articles and four books that I have written since 1966, refining and expanding my views based, in major part, upon subsequent authorities. See especially, most recently, Freedman, *supra* note 16.

⁴² See Kurt Eichenwald, *Verdict on an Era: Enron in the 90’s: Arrogant and Reckless*, N.Y. TIMES, May 26, 2006, at C1.

⁴³ Flowers, *supra* note 6, at 650 n.21 (citing *United States v. Havens*, 446 U.S. 620, 626 (1980)).

That is a non-sequitur. What Professor Flowers omits is that the *Havens* opinion was expressly discussing the consequence for the defendant of being cross-examined by the government with “evidence in its possession,” specifically, a confession to the police.⁴⁴ Thus, the Court was not endorsing the betrayal of lawyer-client confidences to provide the prosecution with evidence that is not already in its possession. Moreover, in a related case, the Court made it clear that it was referring to “the traditional truth-testing devices of the adversary process.”⁴⁵ Betrayal of confidences by a defendant’s own lawyer is in no sense a truth-testing device of an *adversary* process.

My final point of disagreement is with Professor Flowers’ assertion (and John Wesley Hall, Jr. agrees with her⁴⁶) that if the prosecutor learns of the informant’s perjury, the prosecutor will file additional charges against the informant. One certainly might expect that to be true but, as illustrated in the next section, it is not. Even when I specifically asked them by email, neither Professor Flowers nor Mr. Hall was able to cite a single case in which a cooperating witness who was exposed as having committed perjury on behalf of the government, has been prosecuted for that crime. As long as the cooperating witness does not recant her testimony and stays “on the prosecution team,” she is safe from a perjury prosecution.⁴⁷

A revealing exception to that government policy is *United States v. Wallach*.⁴⁸ There the cooperating witness, Guariglia, had stuck to his incriminating testimony against Wallach and his co-defendants. In the same testimony, however, Guariglia had perjured himself in testimony that was collateral but that was nevertheless material, and the prosecutors had implicated themselves in his obvious perjury by consciously avoiding recognizing it as perjury and by preventing its exposure before the jury.⁴⁹ As one part of their effort to maintain Guariglia’s credibility despite the perjury, the prosecution had successfully moved to exclude both eye-witness and documentary evidence that Guariglia had lied.⁵⁰ Nevertheless, although the trial judge had been fully aware of that suppressed evidence, he failed to give any warning instruction to the jury about the possible unreliability of

⁴⁴ *Havens*, 446 U.S. at 626. Another adverse consequence to which the Court referred is prosecution for perjury. *Id.* at 627.

⁴⁵ *Harris v. New York*, 401 U.S. 222, 225 (1971).

⁴⁶ John Wesley Hall, Jr. says that exposure of the informant’s false testimony will lead to a perjury indictment. Hall, *supra* note 7, at 667.

⁴⁷ For examples of cases in which a cooperating witness was prosecuted for multiple counts of perjury after turning on the prosecution by recanting, see *Dunn v. United States*, 442 U.S. 100 (1979); *United States v. Tibbs*, 600 F.2d 19 (6th Cir. 1979).

⁴⁸ 935 F.2d 445 (2d Cir. 1991).

⁴⁹ *Id.* at 455–57. Stating it as delicately as possible, the Court concluded: “We fear that given the importance of Guariglia’s testimony to the case, the prosecutors may have consciously avoided recognizing the obvious—that is, that Guariglia was not telling the truth.” *Id.* at 457.

⁵⁰ *Id.* at 456.

cooperating-witness testimony.⁵¹

III. THE PROSECUTION IGNORES A COOPERATING WITNESS'S PERJURY

Mario Montuoro had an established relationship with the United States Department of Justice as a cooperating witness.⁵² His criminal record included four arrests, one for possession of heroin and one for possession of a gun.⁵³ Montuoro's cooperation might have stemmed from a desire to gain favors from the prosecutors and/or from grudges against those about whom he informed.⁵⁴

Beginning in 1979, Montuoro told the Federal Organized Crime Strike Force in Brooklyn that Ronald Schiavone and Raymond Donovan, as officers of Schiavone Construction Company, were guilty of making an illegal cash payment to a union officer.⁵⁵ Montuoro said that the payment had been made during a luncheon at Prudenti's Restaurant in May or June of 1977, and he so testified before a federal grand jury.⁵⁶

The grand jury declined to indict Mr. Schiavone and Mr. Donovan⁵⁷ and, thereafter, a federal court appointed Leon Silverman Special Prosecutor to investigate Montuoro's testimony about the luncheon at Prudenti's. With the help of three Assistant Special Prosecutors and the FBI,⁵⁸ the Special Prosecutor conducted an exhaustive investigation and concluded that "no credible evidence exists that a luncheon as alleged by Montuoro ever occurred."⁵⁹ Perjury, of course, was one of the several serious federal crimes that Montuoro had committed as a cooperating witness.⁶⁰ Nevertheless, the Department of Justice refused requests by Schiavone that Montuoro be prosecuted.⁶¹

Schiavone and Donovan were prominent citizens. Donovan was Secretary of

⁵¹ *Id.* at 455.

⁵² *In re Application for Appointment of Indep. Counsel*, 596 F. Supp. 1465, 1466 (1984).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ REP. OF THE SPEC. PROSECUTOR, D.C. CIR., No. 81-2, Sept. Term 1981, vol. I, at 3 (June 25, 1982).

⁵⁹ 596 F. Supp. at 1466. The Special Prosecutor also found:

In an exhaustive search, no documentary evidence of the alleged luncheon was found to exist. Moreover, none of Montuoro's efforts to fix the date of the luncheon proved availing; quite the contrary, they conflicted irreconcilably with one another. Furthermore, substantial physical evidence contradicted elements of Montuoro's story—a story which varied in significant detail each time it was repeated.

REP. OF THE SPEC. PROSECUTOR, *supra* note 58, at 13.

⁶⁰ *In re Application for Appointment*, 596 F. Supp. at 1466.

⁶¹ *Id.*

Labor in President Reagan's cabinet from 1981–1985. Schiavone held two degrees from Dartmouth College and was a member of the Board of Overseers at Dartmouth and an officer of national and state professional organizations. He was also a proud man who was incensed by the damage to his reputation caused by the publication of Montuoro's false charges against him.

Accordingly, Schiavone asked me to represent him in applying to a federal court for the appointment of a special prosecutor to prosecute Montuoro for perjury. Although I believed that such a lawsuit would be meritorious,⁶² I also believed that, as a practical matter, a federal court would be unlikely to take such action. I therefore tried to dissuade Schiavone from going forward. However, he was adamant, in part because he wanted to make a public record of what Montuoro had done to him. Despite strong support in affidavits from five leading experts on prosecutors' ethics,⁶³ we were unsuccessful. As a result, the prosecutors were able to continue protecting the false witness who was so willingly cooperating with them.

IV. CONCLUSION

So, where have the defense lawyers, prosecutors, and judges been while "outright conscienceless sociopaths" have repeatedly been doing anything to benefit themselves, including "lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and doublecrossing anyone with whom they come into contact"?⁶⁴

As the submissions to this symposium suggest, putting the burden on defense counsel is the least appropriate way to deal with the problem of the cooperating witness who lies, because it carries serious consequences for lawyer-client trust and confidence and for the effective assistance of counsel. Prosecutors should not only be more careful in accepting the testimony of such people, but should stop encouraging and condoning conscienceless cooperators to help them to build cases. Moreover, judges should strongly warn jurors to be skeptical of such testimony, and should also take a more active role in discouraging the use of questionable

⁶² Previously, I had written about the need to appoint a special prosecutor when the prosecutors' office has a conflict of interest. MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 93 (1975). Also, I had had success with such an application in the District of Columbia Superior Court. *Landlord Finally Pays Fine*, WASH. POST, May 22, 1971, at B1.

⁶³ The five experts were: David T. Austern, former Chief of the Grand Jury/Intake Unit and the Chief of Felony Trials for the U.S. Attorney's Office for the District of Columbia, former Bar Counsel for the District of Columbia, and former U.S. Special Prosecutor; Geoffrey C. Hazard Jr., former Reporter for the ABA Model Rules of Professional Conduct, and Director of the American Law Institute; Norman Lefstein, former Reporter for the ABA Standards for the Prosecution Function; Sam Dash, former Chief Counsel for the Senate Watergate Committee; and James P. Manak, former Director of the National District Attorneys Association Project on Standards and Goals, which produced the NDAA Prosecution Standards.

⁶⁴ Trott, *supra* note 1.

cooperating witness testimony, especially from those who make a practice of incriminating others in order to ingratiate themselves with prosecutors.